Brink's USA *and* Law Enforcement Employees Benevolent Association. Case 22–CA–27870

July 1, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On February 4, 2009, Administrative Law Judge Eleanor MacDonald issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. July 1, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, __ F.3d __, 2009 WL 1676116 (2d Cir. June 17, 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed __ U.S.L.W. __ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for rehearing filed Nos. 08-1162, 08-1214 (May 27, 2009).

[2] Although the General Counsel states that credibility is not an issue in this case, the General Counsel appears to have implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Benjamin W. Green, Esq., for the General Counsel.

Herbert I. Meyer, Esq. and *Stafford A. Woodley Jr., Esq. (Crowell & Moring),* of New York, New York, for the Respondent

Richard J. Merritt, Esq., of Lindenhurst, New York, for the Union.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge. This case was tried in Newark, New Jersey and New York, New York, on five days from June 24 to July 2, 2008. The Complaint alleges that Respondent, in violation of Section 8(a)(1) and (5) of the Act, refused to bargain in good faith with the Union by engaging in surface bargaining. The Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent in October, 2008, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business at 481-495 New Jersey Railroad Avenue, Newark, New Jersey, is engaged in the business of transporting, protecting, processing and storing money and valuables. Annually, respondent performs services valued in excess of $50,000 in states other than New Jersey. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that Law Enforcement Employees Benevolent Association is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

On April 20, 2006, the Union was certified as the exclusive collective-bargaining representative of Respondent's employees in the following appropriate unit

> All full-time and regular part-time drivers, messengers, guards, vault guards, coin and currency guards, ATM techs, garage persons, night loaders and premise guards employed by Respondent at its 481-495 New Jersey Railroad Avenue, Newark, New Jersey facility, excluding all other employees and supervisors as defined in the Act.

The Law Enforcement Employees Benevolent Association, (LEEBA), was formed in 2002. Its founder and president, Kenneth Wyndor, is a retired New York State Trooper. The vice president of the Union, Marlando Williams, is also a re-

[1] The record is corrected so that at page 15, line 17 the date is May 23; at page 36, line 2 the date is "12-27"; at page 51, line 13 the correct phrase is "Bates stamped"; at page 107, line 21, the phrase should be "Newark branch"; at page 161, line 12 and 13, the phrase should read "surface bargaining".

tired New York State Trooper. Union Attorney Richard Merritt is a retired airline pilot.

The first collective-bargaining session between the Union and the company took place on May 23, 2006. LEEBA's bargaining committee consisted of Williams, Merritt and Union recording secretary Robert Meletiche. Williams gave an affidavit in which he identified himself as the chief negotiator. Merritt testified herein that the Union never designated a chief negotiator and that both he and Williams had authority to bargain. The lead negotiator for Brink's was Attorney Jeffrey Pagano. Attorneys Herbert Meyer and Stafford Woodley also attended the negotiations on the company's behalf. Meyer testified that on May 23 and thereafter it seemed that Merritt was the chief negotiator for the Union.

In addition to its certification to represent the Newark employees of Brink's, LEEBA represents employees of the New York City Environmental Police which is under the jurisdiction of the New York State and City public employee bargaining laws.[2] The Union also represents the private police force of a gated community in Brooklyn.[3]

The testimony of Williams and Merritt makes clear that their knowledge of labor relations stems from their employment in, respectively, the New York State public employee sector and the airline industry. Williams has never concluded a collective-bargaining agreement under the NLRA.[4] Attorney Merritt testified that his labor relations experience stems from his employment under the Railway Labor Act. In that milieu negotiations went on for a long time and all contracts were retroactive to the expiration date of the prior contract. Merritt testified that during the negotiations at issue herein he believed that any collective-bargaining agreement he negotiated with Brink's would be retroactive to the date of the Union's certification. Merritt testified that throughout the negotiations with Brink's he believed that if impasse were declared some neutral agency would decide the terms of the contract between the Union and Brink's. Merritt testified that he was unfamiliar with NLRB procedures.

The existing pay scale for the Newark employees is shown on a document variously referred to as the "132 grid" or as the "grid."[5] As described by Meyer, the grid is a system of flat pay by seniority. The wage rates are grouped by job title. Each job title is given an entering wage rate and there are progressive step increases by seniority after a certain number of months have been worked. The grid provides employees with automatic hourly wage increases in their 13th month of employment and in the 37th, 61st and 97th month of employment.[6] As an example, after 12 months a Building/Turret Guard goes from $9.45/hour to $9.85/hour; a Messenger goes from $11.60/hour to $12.60/hour.

B. Credibility of the Witnesses

I find that Williams did not have an accurate recall of all the events about which he testified. His testimony occasionally contradicted the written evidence. For example, he faulted the employer for being unavailable to bargain during certain periods but the documentary evidence shows that this was not the case. Williams' bargaining notes were sketchy and incomplete and did not offer a reliable record of the negotiation sessions. Williams occasionally testified to one version of events on direct examination and to a different version on cross-examination.

I find that Merritt had a very poor memory for the events at issue. I will give only a few examples: It is well established that the parties herein used the initials "TA" to signify that they had reached a tentative agreement on certain contract language, but Merritt stated on direct examination that he did not recall what the initials "TA" mean. Merritt often testified that he had not received certain documents where the record is indisputable that he had indeed been given the documents. When asked about a significant event such as the Brink's notice to the Union of a change in the company-wide insurance plans applicable to the unit employees, Merritt at first did not recall responding to the letter even though the parties eventually bargained and reached agreement on this subject. I also observed that Merritt was combative with Counsel for the General Counsel when called for direct examination, and I observed that he did not listen to some questions and he did not answer them. Merritt adopted a cavalier attitude to portions of his testimony. When asked about the 132 wage grid applicable to the unit members, Merritt stated, "I've seen it on a piece of paper, 132, but I truly don't know what the hell 132 means."

I generally credit the testimony of Pagano, Meyer and Woodley. Their testimony was supported by their voluminous notes taken during the course of negotiations and was consistent with other documentary evidence.[7] Of further importance is the fact that much of the testimony provided by the Pagano and Meyer was uncontradicted by the General Counsel's witnesses or by the documentary evidence.

Many of the factual assertions in the General Counsel's Brief are based on the testimony of Merritt and Williams. As will be seen from my discussion of the collective-bargaining negotiations, I have not credited the General Counsel's narrative of the negotiations where it is based on the testimony of Merritt and Williams. Instead, I have relied on the testimony of Meyer and Pagano, their notes and the other documentary evidence.

[2] This force is charged with protecting the City's upstate reservoir system. No collective-bargaining agreement is in effect for this unit.

[3] No collective-bargaining agreement is in effect for this unit.

[4] It suffices for purposes of this decision to point out that the New York State public employee bargaining laws bar strikes by public employees and provide for impasse procedures that culminate in interest arbitration; the negotiations are often lengthened by political and budget considerations.

[5] Each Brink's location has a grid showing wage rates for that particular location.

[6] There are some exceptions for part-time employees.

[7] Meyer, Pagano and Woodley took notes at the bargaining sessions and these were introduced into evidence. In general, Meyer took the detailed notes of the meetings while Pagano and Woodley often took cursory notes or wrote in the margins of the proposals under discussion.

C. The Negotiations Between Brink's and LEEBA

1. May 23, 2006 bargaining session and subsequent communications

a. Negotiations

The parties met on May 23, 2006. The Union was represented by Williams and Merritt. Brink's was represented by Meyer and Pagano.

Williams recalled that at the first bargaining session the parties discussed the discharge of employee Vasquez and the resulting unfair labor practice charge filed by the Union. The parties also discussed progressive discipline and arbitration. The Union asked for the immediate implementation of Union dues check-off.

Meyer testified that at the start of the meeting Brink's gave the Union information about Vasquez' discharge and handed over a copy of the Brink's employee handbook. Merritt stated that Brink's was anti-Union. Pagano disputed this, saying that Brink's had not filed objections to the election and that it had signed contracts at other locations. Meyer's notes indicate that Merritt said the Union had taken the Vasquez case to the NLRB because there was no arbitration mechanism in place. Pagano replied that Vasquez was terminated for conduct that amounted to a breach of security. Pagano said an arbitrator might have decided whether Vasquez engaged in the conduct for which he was fired but that an arbitrator could not second guess Brink's security measures. Merritt demanded an immediate grievance and arbitration procedure, immediate visitation rights for the Union and an immediate dues check-off retroactive to April 20, 2006. Pagano replied that he would consider the Union's demands and negotiate on these subjects. At that point Pagano remarked that the Union had immediate demands but was offering nothing in return. The Union then asked for a clear definition of security and a book that specified what acts could lead to termination. Pagano stressed the need for flexibility and challenged the Union to accept that security is paramount. Pagano told the Union to draw up a collective-bargaining agreement and promised that the company would then prepare a counter proposal. The Union reiterated its request for immediate dues check-off and Pagano replied that the company would not agree at that time but would see where the parties went in the negotiations.

Pagano testified that on May 23, 2006 he discussed security training and gun training with the Union. Pagano said that employees were trained on security procedures and if the Union disputed the enforcement of the rules and regulations it could demand arbitration of that issue. Pagano viewed this as a major concession because he was agreeing to arbitrate the implementation of Brink's rules. Pagano explained that Union visitation was a problem because of Brink's security arrangements. The Union wanted its officers to be able to carry their firearms but the company did not permit visitors to be armed on its premises.[8] The parties discussed the possibility of leaving firearms in the cars if the parking lot were available.

Pagano testified that he explained to Merritt and Williams that the collective-bargaining agreement had to be negotiated in its entirety and that the parties could not leave any open issues in the hope that they would be resolved by interest arbitration.

b. Communications May through August 2006

On May 29 Merritt followed up the discussions with a letter stating some of the same Union demands and requesting certain information.

Pagano replied by letter of June 6; he declined immediate visitation and dues check-off but he offered to negotiate on these subjects. Pagano also replied to the various information requests and attached 28 pages of responsive documents.

On June 19, Pagano sent an e mail to Merritt asking when he would receive the Union's initial contract proposal and asking for suggested dates to meet for collective-bargaining. Pagano stated that he would not be able to prepare a counter-proposal until he received the Union's demands and he said that he would not be available to meet during the month of August.[9]

Merritt replied on June 29 that he had not received Pagano's June 6 letter nor the requested documents. On June 30 Meyer answered on behalf of Pagano that the June 6 communication had been sent by Fed Ex and had been signed for by either Merritt or his wife at 2:17 pm on June 7.[10] Meyer remailed the material to Merritt on the same date.

On August 9 Merritt wrote to Pagano concerning a disciplinary action against employee Marcucci. Merritt further stated, "[B]ecause of the Vasquez situation and the fact that an improper practice petition is pending at the NLRB, LEEBA has suspended contract negotiations and will await the outcome of the Vasquez termination case at the NLRB."[11] Pagano replied to Merritt on the same date that, "Brink's stands ready to negotiate a collective bargaining agreement. In my opinion LEEBA's course of action is in error as the issues you raise . . . have nothing to do with the duty to negotiate as provided under the NLRA."

c. Communications September through December 2006

The Union sent its first proposal to Brink's on September 27, 2006. Merritt's cover letter to Pagano stated:

> Please review the agreement and give me a call concerning the sections of the Agreement that we need to negotiate.
>
> Please notice that I have omitted pay in the agreement as LEEBA would like to negotiate compensation to be included after our bargaining is completed.

Although Merritt's letter stated that the Union proposal did not contain a pay demand, the document did in fact include a section entitled "Wage Schedule." That section stated that the minimum rate was "to be negotiated and agreed upon." It also contained the following language:

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[8] As retired State Troopers, the Union's officers were licensed to carry firearms.

[9] Pagano had orally advised Merritt that he had custodial visitation with his sons in the month of August.

[10] The FedEx tracking summary was furnished to Merritt.

[11] Williams testified that after May 23 the Union did not continue negotiations because the Vasquez case had not been resolved.

> On the effective date of this agreement, all bargaining unit employees shall receive a One Dollar ($1.00) per hour increase over and above their current rate of pay.
>
> Upon the first and second anniversary date of this Agreement, all bargaining unit employees shall receive an additional One Dollar ($1.00) per hour increase over the prior current rate of pay.

The Union's proposal included sections taken from the Brink's booklet outlining Working Conditions and Benefits (WCB), including sections dealing with vacation, bereavement leave, jury duty, medical insurance, the 401(k) plan, uniforms, drug-free workplace, and various breaks.

Meyer testified that the Company's negotiators believed some of the Union proposals were unlawful. The union security provision was contrary to law and the checkoff provisions were made retroactive to the date of certification. The leave of absence provisions were not consistent with the FMLA and the ADA. The Company thought that the proposal required application of strict seniority in determining overtime and this was harsh because it could not be implemented when a truck was already out on the road. The entire contract was to be retroactive to the date of certification and this was also unduly harsh in the view of management. The Company thought the wage proposal was unreasonable.

The parties had been conducting settlement discussions of the Vasquez matter; the unfair labor practice charge was conditionally withdrawn on October 30 and the final steps were taken to implement the settlement on December 5, 2006.

On November 9 Pagano wrote to Merritt to inform him that effective January 1, 2007 there would be changes to the various company-wide insurance plans covering Brink's employees. Pagano offered to meet with the Union to discuss the changes and to bargain on "these discrete matters and any different and alternative plans LEEBA may desire for the Newark bargaining unit, as well as any other mandatory subject of bargaining." Pagano stated that time was of the essence and he urged that the parties meet and bargain without delay. His letter concluded, "If you and LEEBA desire to meet and bargain on these discrete issues and other mandatory subjects of bargaining as well, please advise me right away and provide your immediate available dates for the parties to meet."

Merritt responded to Pagano on November 17. He asked for the current insurance plans asserting that the Union "does not have the current policies and would like to see the current policies along with the proposed changes before meeting." Merritt also stated that "LEEBA would like to meet and have further negotiations at the earliest possible date but feels neutral negotiation site would be more appropriate." Merritt suggested a hotel near LaGuardia airport.

On November 29 Merritt sent an e-mail to Pagano. While also discussing other subjects not related to the issue in this case, Merritt asked for a counter-proposal to the Union's written demands and threatened to file a charge with the NLRB.

Pagano replied to Merritt on December 1, 2006. Pagano pointed out that the materials relating to the current insurance benefits had been provided twice in June pursuant to the Union's information request; he attached the materials pertaining to the company-wide changes effective January 1, 2007. Pagano noted that Merritt had refused to meet and negotiate despite Pagano's request for negotiations. Pagano stated that Brink's had a complete contract proposal and that he wanted to meet face to face with the Union and present the proposal. He said, "[I]t requires a detailed explanation regarding many of the terms and conditions contained in the proposal and the reasons for the inclusion of those terms and conditions in the proposal, to assure your and LEEBA's full understanding of what Brink's considers important to the operations of the Newark Branch." Pagano reiterated that time was of the essence concerning the insurance changes and he offered to meet on December 5 and 6.[12] Pagano declined to incur an expense for a meeting location and he offered his offices or a Newark location.

Merritt could not meet during the week suggested by Pagano because he was due to commence a trial on December 4. On December 2 Merritt wrote to Meyer that the Union was confused about the offer to negotiate concerning the changes to the company-wide insurance plan. Merritt and Williams did not know whether Brink's suggested, "that LEEBA negotiate the Company wide plan for its members? Or is there something different being offered to the organized members over the other members of Brinks?" Merritt requested a copy of the Brink's complete counter proposal prior to scheduling a negotiating session.

Pagano sent the Company's contract proposal to Merritt on December 6. Pagano repeated that the proposal required explanation and he assured Merritt that, "[E]ach and every one of the terms and conditions contained in the proposal are open and subject to bargaining and to modification or deletion through the good faith bargaining process." Pagano also explained the offer to negotiate about changes in the company-wide insurance plan. The Company's initial proposal contained provisions for Union security, checkoff, Union visitation, a grievance procedure with arbitration, merit pay increases and employee seniority. According to Meyer, the Company wanted to signal that its offer was a starting point on the way to reaching an agreement.

The Company's initial proposal was for the wages and steps in the 132 grid to remain unchanged for one year, and for merit increases thereafter. Brink's proposed that if an employee was required to work in a lower paid classification than his usual job title he would be paid the lower rate for the time. This was different from the working conditions actually in effect and it was less favorable to the employees. Unlike the conditions actually in effect, the proposal did not call for overtime pay. Newark employees were currently guaranteed four hours pay if called in to work, but the initial Company proposal only guaranteed two hours pay. The Company's initial proposal was less generous than the current conditions on break times, the retention of jury duty pay and vacation time. The Company proposed that employees would bear all future increased costs in

[12] The Union wished to meet at a hotel near Shea Stadium while Brink's did not want to pay for a hotel and Pagano suggested that the parties meet at his law firm in Manhattan where he would provide a separate room for the Union to caucus. I shall not discuss this issue at length as I do not believe it has any bearing on the issue of surface bargaining.

medical benefits and, in other respects, the proposal was less favorable to employees than the current system. Meyer testified that Brink's initial proposal was a starting point and that the Company improved on it in the course of the negotiations.[13]

Although the Union's demand had included a just cause provision for discharge, the Brink's initial proposal did not provide for just cause. In fact, the Company proposed that in the arbitration of discharge grievances, "the arbitrator shall determine only whether or not the discharged employee committed the violation for which he/she was discharged by the Company, without consideration of any asserted mitigating facts or circumstances."[14]

On December 22, 2006 Brink's mailed a check to Vasquez' attorney in connection with the settlement of the unfair labor practice case.

On December 23 Merritt wrote to Pagano suggesting that the parties meet for negotiations on December 27, 28 or 29.

2. December 27, 2006 bargaining session and subsequent communications

The parties met for collective-bargaining negotiations on December 27, 2006. Pagano and Meyer represented Brinks; Merritt, Williams and Meletiche represented the Union.

The Union asked about the employees' fears that the Newark office would be closed and the Company gave its assurances that there were no plans to close the location. The discussion explored the role of Brink's Global Services which provided jewelry deliveries between Manhattan and Newark Airport and which had been the subject of complaints related to tardiness. Employees of the Newark branch provided the service in addition to their other runs.

The parties discussed the fact that a prior branch manager in Newark had not imposed discipline uniformly. They agreed that management would post a notice stating that the rules and regulations in the employee handbook would be followed in the future. The parties discussed the discharges of a non-unit member and a messenger in the bargaining unit. Then the Union and the Company went through their respective proposals and compared the provisions. They discussed dues checkoff, seniority and protective vests. The Union was opposed to termination at will for probationary employees. The Union agreed to the implementation of the medical insurance changes by the company-wide carrier. The parties discussed the grievance and arbitration proposals. The Union wanted employees to have 45 days to file a grievance while the Company asked for 72 hours. Pagano then said he would agree to 7 days for filing a grievance.[15] The parties aired their respective positions on this issue. They agreed on the time within which the arbitrator had to submit the award. The Union wanted the employees to be paid for time spent in the grievance procedure; Pagano proposed that the arbitrator have the authority to decide this issue in each case. A number of tentative agreements were reached during this session. At the end of the session, Merritt remarked that the meeting had been productive. He said he would be in Florida in January and the parties agreed to meet on February 6, 2007.

On January 31, 2007 Pagano sent Merritt the proposed notice to employees informing them that effective immediately all employees are required strictly to adhere to the contents of the Handbook for Brink's Personnel.

In subsequent communications, Merritt offered that a grievance should be submitted in 10 working days and he mistakenly recalled that Brink's was still insisting on 72 hours. He asked whether the parties could agree on progressive discipline and he asked about changes to the employee notice about the Handbook.

3. February 6, 2007 bargaining session and subsequent communications

a. Negotiations

The parties met on February 6, 2007. Pagano and Meyer represented the Company; Merritt, Williams and Meletiche were there for the Union.

The parties agreed to the wording of the notice to employees concerning strict adherence to the Handbook.

The parties discussed a new proposal from the Union which Merritt had sent to Pagano shortly before the meeting began. The Union had drafted a new recognition clause which would have expanded the recognition to all of New Jersey; the Company replied that the certification applied only to the Newark branch. Pagano offered a successors clause and the parties agreed to the language. The parties agreed that the probationary period for new employees would be 90 days. The Union wanted to be able to arbitrate the termination of probationary employees but Brink's rejected this demand. The parties agreed on the language of a Union security provision.

The parties discussed the Union's proposed article on discipline in great detail with each side giving practical reasons for their respective positions.

The Union proposed an introductory clause which stated, "The effective date of the Agreement shall be April 20, 2006 for pay and benefits for covered employees and for the purpose of setting dues collection and initiation fees payable to LEEBA." In a clause devoted to wages and hours of work, the Union proposed, inter alia, that on the effective date of the agreement employees would receive a $1.00 per hour increase over their current rate of pay. Upon the first and second anniversary dates employees would receive an additional $1.00 increase above their then current pay rate. The proposal stated that a starting rate of pay for employees was to be negotiated, and once the probationary period was completed "the pay scale shall automatically advance to the current rate in effect for all other employees performing the same job functions covered under this agreement." This provision was inconsistent with the 132 grid currently in effect which provided a series of step increases for employees in each job title based on length of service.

[13] As will be discussed below, Brink's eventually agreed to changes on many of these subjects.

[14] The employer's position was not modified until June 9, 2008 when it submitted a management rights proposal that stated the company could discharge employees for just cause.

[15] Williams' bargaining notes show that Pagano proposed seven days or one week.

Merritt and Williams asked about wage increases and the fact that the Newark 132 grid had not been increased in 2006.[16] Meyer told the Union that although the grid for each branch was reviewed every year not every branch received an increase in the grid amounts. Meyer asked the Union for a suggestion. He said that a review was to be done in February 2007. He asked the Union if the review should be performed and the Company should determine whether to increase wages on the grid. In the alternative, Meyer said, the parties could negotiate a review to determine the increase. Meyer testified that he asked if Brink's should forget the 132 grid. The Union then agreed that the Company would review the pay grid to see if it should be increased and then notify the Union and negotiate whether to give an increase and if so how much.

After a lunch break, Merritt complained that the Company was nit-picking over every word in the Union proposal. He said he wanted to get to the bottom line. Pagano wanted to read the Union proposal and discuss it at the meeting, but Merritt did not want to do this. Pagano replied that the Company had received the Union's proposal only that morning and that the parties had been discussing serious issues. Merritt said he wanted to know where they were going and whether there would be a pay increase. Pagano said the only way to know that was to determine the contract. Merritt asserted that the Union proposal was 95% equal to the Company's proposal and that he did not want to sit and nit-pick for the next four hours. Merritt asked that Pagano go through the Union proposal and tell him where it was objectionable and Pagano replied that he had to compare the Union proposal to the Brink's proposal.

Pagano said he could not make a wage proposal and he asked Merritt to explain the Union's proposal on wages and benefits. Pagano asked how the Union's language impacted the 132 grid. Williams said that they needed a raise and needed to know what change would be made to the 132 but that a 25 cent or 50 cent raise would not be sufficient. Merritt said the Union wanted $1.00 to start as stated in the Union proposal; if the company did not agree then the parties were at impasse. Pagano said he had asked a simple question. Merritt replied that he wanted $1.00 to April 20, 2006; if not the parties were at impasse. Pagano testified that Merritt pointed his finger at him. At that point, Pagano told Merritt to lower his voice and stop pointing and that if Merritt did not like his method of negotiating he could leave. According to Pagano and Meyer, Merritt then left in a huff. Williams testified that Pagano asked Merritt to leave, but he also stated that Merritt yelled and pointed at Pagano and that Pagano told him to stop and sit down, adding that if Merritt did not like it he could leave. When Pagano went to the elevator bank to apologize to Merritt at Williams' request, Merritt was gone. Pagano and Meyer continued the discussion of wage increases with Williams and Meletiche.

b. Communications February 2007

On February 7, 2007, Pagano confirmed arrangements he had made with Williams that the parties would meet again on February 13 near JFK airport from 10 am to 2:30 pm. On February 8 Merritt wrote to Pagano asking whether he would give the Union an economic package and "changes" before the meeting date. Pagano replied

> In order for Brinks to assess the progress of the negotiations and understand whether a wage proposal is appropriate under the circumstances to be presented at the next negotiating session please confirm LEEBA's position remains as you stated in the last meeting. That is, unless Brinks agrees to the proposal presented by LEEBA at the meeting, it determined that an impasse existed and declared an impasse in the negotiations."

Merritt sent Pagano a draft proposal on February 10 and e mail that stated, "If Brink's is unable to offer an economic package, kindly inform me and I will cancel the next bargaining session." The Union draft was ostensibly based on the Brink's proposal; Merritt wrote that the Union's proposal "clearly incorporates 90% of what Brink's proposed to LEEBA and is formatted with the same Article numbers used by Brink's."

Pagano replied on February 12. He pointed out that there were many differences still remaining between the Union's and the Company's draft contracts. Pagano wrote

> We have reviewed and analyzed your proposal. The first half or so did track the provisions contained in Brink's proposal but only in title. Except for the three or four provisions that we had already "tentatively" agreed to and initialed, you substantively changed virtually every provision contained in Brink's proposal. Consequently, negotiations must continue in order to resolve the vast differences between the proposals.
>
> Furthermore, the second half or so of your proposal addresses the same provisions contained in the first half in many respects, and contradicts those provisions…. Regarding your request for a wage proposal by Brink's at tomorrow's session, we believe that a proposal at such time would not be appropriate. . . .

Pagano went on to reject the demand that any wage increases be retroactive to April 20, 2006, and he asked whether the Union's wage proposal was its "bottom line."

Later in the day on February 12 Merritt wrote to Pagano. With regard to the substantive aspects of the negotiations, Merritt stated[17]

> Brink's . . . is therefore declaring an impasse on any request to increase wages and/or benefits. Please confirm.
>
> Brink's apparently wants the unfettered discretion to terminate any employee at any time without recourse. . . . Progressive discipline is an industry standard and I believe an arbitrator will agree. I also believe that cost of living increases in pay will be awarded. So, sit tight on pay raises and progressive discipline because an arbitrator will grant them.

[16] Employees were receiving seniority step increases but there had been no general increase in the grid amounts.

[17] Merritt also asked for financial information and this was refused by Pagano. I will not detail those exchanges because they are not relevant to my decision.

4. February 13, 2007 bargaining session and subsequent communications

a. Negotiations

The parties met on February 13, 2007 at a Holiday Inn in Queens. The Company was represented by Pagano and Meyer; Merritt and Williams were there for the Union.

Merritt had prepared a new Union proposal which he claimed was 90% the same as the Brink's proposal. Meyer informed Merritt that there were still many significant differences between the two.

The Union had not altered its Union security provision to correct what Brink's believed was a violation of the NLRA.

Pagano informed the Union that Brink's had reviewed the 132 wage grid for Newark and that no changes were being made in the wage rates. Pagano stated that he was still prepared and authorized to negotiate on wages with the Union. Pagano said the Union had left blank the provision for a starting wage rate; he asked the Union what it wanted as a starting rate.

Pagano then agreed to pay overtime after 40 hours of work in a week. Neither Pagano's question about the starting rate nor this change in the Brink's position produced any movement by the Union on the subject of wages.

Williams said that the Union was not interested in merit raises. Instead, the Union wanted a flat increase of $1.00 each year, retroactive to the April 20, 2006 certification date. Pagano rejected a retroactive wage increase and said he would only agree to a raise "going forward." Williams replied that the Union had represented the employees from the date of certification and that Brink's had to negotiate back to 2006. Pagano told him that he was wrong; the contract would be prospective. Williams insisted that the retroactivity of wages and the entire contract was mandatory as a matter of law to the date of certification, but Meyer explained that this was not the case under the NLRA. Meyer stated, however, that except for the Union security provisions, the Company would bargain about retroactivity. Pagano said that Brink's would negotiate about wages and that its offer was to grant merit increases. Merritt rejected this offer and said that the parties were at impasse.[18]

Meyer told the Union that it was unheard of in the private sector to have retroactivity of wages for an initial collective-bargaining agreement, although it was common in successor agreements.

The parties discussed the Company's proposal to pay employees working in a lower classification the rate for that classification. The Union objected to the reduction. Merritt said he thought there was an impasse and he proposed going through the proposals to see where the parties were at impasse. Meyer testified that Merritt said all he wanted to do was determine where the parties were at impasse, and then he would "take it to the NLRB." Merritt said the arbitrator would grant a retroactive wage increase. Merritt was still under the impression that the Board had the power to compel interest arbitration. Pagano told the Union that the parties were not at impasse.

Merritt said the parties were at impasse over the Union's demand to grieve and arbitrate the discharge of probationary employees. Pagano said Brink's still wanted to negotiate. Merritt said the parties were at impasse over the wording of the disciplinary provisions. The Union's proposal had language imposing certain duties on management and Pagano said he was not willing to negotiate management's duties. Pagano went through the disciplinary language and explained why he objected to it. He also agreed to certain provisions suggested by the Union.

At Merritt's request, Pagano then went through the Union's written proposal and indicated which particular provisions Brink's rejected and which were accepted. Pagano said that certain provisions were important and complex and had to be looked at closely. These included articles relating to shop stewards and seniority. Pagano indicated that certain Union demands relating to seniority could be met.

Pagano then pointed out that the Union's proposal contained two provisions relating to probationary employees and he said that the provisions contradicted each other. Merritt flew into a rage and called Pagano a "prick" and a "cock-sucker." Meyer told Merritt that the latter had twice characterized the meeting as the "last meeting" and he asked whether the Union wanted another meeting. Merritt acknowledged that his February 13 proposal had mistakes, including the two conflicting probationary provisions. The parties then discussed layoffs. Merritt wanted layoff by strict seniority and Pagano said employee qualifications must be considered. Williams suggested seniority within a classification and Pagano agreed to the concept and said the language would have to be worked out.

Merritt said he did not want another meeting unless the Brink's made some substantive changes. Williams testified that the Union position was not to engage in further negotiating sessions until the employer made a good faith financial proposal.

Williams testified that after this meeting, Merritt told him the company did not want to negotiate management's duties and as a result he would remove the management rights provision from the Union proposal.

b. Communications February through April 2007

On February 14, 2007 Merritt wrote to Pagano, enclosing a new Union proposal. Merritt asked that Pagano respond by February 25. Merritt wrote, "I'm further informed that where Brink's has declined to give a pay raise LEEBA is entitled to economic information concerning the Newark operation. I therefore make demand for disclosure of economic information concerning the profit and loss of the Newark station." Pagano replied on February 15 declining to furnish the information because "Brink's never asserted in these negotiations an inability to increase compensation, but rather, its unwillingness to increase wages due to competitive factors in the marketplace."

On February 27 Pagano wrote to Merritt in response to the draft agreement of February 14. He pointed out that the new draft specifically made the entire contract retroactive to April 20, 2006, including the wage increase and Union security. Pagano wrote that the retroactive application of Union security was unlawful. Pagano noted that Merritt's draft had omitted a

[18] Williams testified that he still believed that "Brink's had no discretion as to when our contract was to start, and that it had to be retroactive to our start date of certification."

management rights clause on the ground that Brink's would not negotiate such a clause. Pagano restated his position that the Company would indeed negotiate such a clause but that Brink's would not negotiate over management's duties.

Pagano's letter proceeded to comment in great detail on the Union's February 14 proposal, attaching a copy of the Union's new draft with explanatory annotations. Pagano pointed out that the Union's newest draft contract changed many of the provisions that the parties had already agreed to and initialed. Pagano's letter has not been refuted by any record testimony or evidence and it is supported by the draft collective-bargaining agreement with initials written next to each agreed-upon paragraph by representatives of the company and the Union. I credit Pagano's letter and I shall rely upon it together with other record evidence and the draft showing agreements reached prior to February 14.[19]

On February 6 Merritt and Pagano had initialed the first paragraph of a draft collective-bargaining agreement with language stating that it was "effective the ___ day of ___, 200_". Merritt's February 14 draft replaced the word "effective" with the word "executed." As Pagano pointed out, this was in line with the Union's continuing demand that the Company agree to a fully retroactive contract. Pagano also pointed out that Merritt had omitted language which would apply the contract to Brink's Global Services and its successors, as previously agreed by the parties. Pagano reiterated his opposition to recognizing the Union for the entire State of New Jersey. Pagano noted that language relating to probationary employees had been agreed to by Merritt previously but that Merritt had now changed the agreed-upon provisions. Pagano repeated his opposition to submitting the discharge of probationary employees to the grievance procedure. Pagano noted other minor language changes made by Merritt and explained his position with respect to those changes.

Pagano stated his agreement to much of the Union's February 14 draft relating to discipline and he explained where he rejected the language offered by the Union.

Pagano noted that Brink's had agreed to various Union proposals relating to uniforms, equipment and personal appearance during the February 13 bargaining session. He again rejected the Union demand that the Company pay the cost of protective gear.

Pagano rejected the demand for a $1.00/hour increase retroactive to April 20, 2006 and he restated Brink's current proposal to retain the status quo for the first year of the agreement. However, he said that Brink's was willing to negotiate an across the board increase either standing alone or in connection with the 132 wage grid.

Pagano noted that on February 13 he had agreed to pay overtime for work in excess of 40 hours per week. Pagano rejected overtime pay for all hours worked on holidays. Pagano agreed to the Union's proposal that employees working on certain listed holidays would receive an additional eight hours pay. The Union's proposal, as written, would have given employees who worked on holidays both overtime pay and an additional eight hours pay.

Pagano agreed to certain of the Union's proposals for various types of leaves of absence but he said that the precise language was still to be worked out. With respect to two Union proposals, Pagano believed that the language was contrary to the FMLA and to the law regarding military leave. Pagano agreed to the Union's vacation proposal but disagreed with the wording of certain provisions. Pagano agreed in principle with most of the Union's draft concerning health benefits but he did not agree to the language as written. Pagano agreed to some of the Union's language regarding seniority and rejected other provisions. Pagano rejected the Union's grievance and arbitration proposal and stated his preference for the language he had offered the Union. Pagano agreed with the principle of no strikes/no lockouts, but preferred the language in the Brink's proposal.

The letter closed with Pagano's offer to meet and bargain with the Union and requested that Merritt advise him how he wished to proceed.

On March 6, 2007 Merritt replied to Pagano, contesting various points in Pagano's letter. Merritt attached another draft collective-bargaining agreement. This document made some changes in response to Pagano's letter, for example in the recognition clause and the probationary employee provision. However, the entire agreement was still retroactive to April 20, 2006. As Meyer and Pagano read the Union's newest draft it provided a $1.00/hour increase effective April 1, 2007 and another $1.00/hour increase on April 20, 2007, the first anniversary date of the agreement, and the effect of these increases on the 132 grid was not made clear.[20]

Pagano answered Merritt's letter on March 15, complaining that Merritt had not responded to most of the points raised in Pagano's February 27 letter about the Union's draft. Pagano asked for another meeting with the Union in order to discuss both the LEEBA and the Brink's proposals. Pagano said that Brink's would give consideration to wage increases.

Merritt replied to Pagano on March 20. He complained that Pagano had not gone through the specifics of the latest Union draft and that Pagano did not acknowledge changes made by the Union, and he asked Pagano to revisit each Union proposal giving the reasons for rejection. Merritt said, "Based on your response to this request, LEEBA will determine if any further meetings will be fruitful or productive."

On April 22 Merritt wrote to Pagano asking Brink's to justify its position on various issues and suggesting that the parties meet on April 30 at a golfing community on Long Island.[21]

[19] This draft is General Counsel's Exhibit #18 in evidence. The document in evidence bears handwritten changes agreed to by the parties in later sessions as well as notes made by Williams. Williams testified that these notes were not complete; further the document does not reflect the agreements of December 10, 2007.

[20] The Union representatives were orally stating their demand for a contract retroactive to April 20, 2006 and the wording of the Union's proposal declared that the agreement would be "effective" on that date. Article VI of the Union's proposal provided for a $1.00/hour increase on April 1, 2007 and on the first anniversary date of the contract, which would be April 20, 2007. The draft also provided for a $1.00/hour increase on the second anniversary date of the contract.

[21] The location is Williams' place of residence.

Pagano responded to Merritt the next day and agreed to the meeting.

5. April 30, 2007 bargaining session and subsequent communications

The parties met for negotiations on April 30, 2007 in Coram, New York. Merritt and Williams represented the Union; Meyer and Pagano represented Brink's.

The parties went through the Company's March 30 proposal. Brink's withdrew some language that excluded the recognition language of the contract from the purview of arbitration and the parties agreed to all the language in that Article I. Brink's withdrew some language in the article dealing with probation and the parties signed off on the first section of that Article II. However, the Union would not agree that discipline of probationary employees was not subject to grievance and arbitration and that issue was still open. The parties had already agreed to the union security language in Article III. The parties agreed to the language of Article IV Rules and regulations which reference the company Handbook for Personnel. The parties agreed to many provisions of Article V Discipline, including the language which listed those violations that could lead to discharge. At the end of the session Merritt asked whether there was a pay raise in the future and Pagano replied that the grid already in place provided increases in pay based on length of service.

At Merritt's request, on May 7, 2007 Pagano sent him copies of the provisions the parties had signed off on at the April 30 meeting as well as copies of Brink's initial December 6, 2006 proposal.

There appears to have been no communication between the parties until June 26 when Pagano wrote to Merritt and Williams concerning Brink's Global Services Division. Pagano informed the Union that there was a shortage of personnel in Newark and that Brink's wished to transfer the Global Services Division work to another branch outside New Jersey. No layoffs would result from the transfer. Pagano offered to bargain on the decision and the effects of the proposed transfer of work and he asked for an early meeting date.

6. July 9 and 10, 2007 bargaining sessions

On July 9 Brink's was represented by Pagano and Woodley and the Union was represented by Merritt and Williams.

As described below, Brink's handed the Union a written wage proposal. The starting rate for probationary employees was left blank. No wage increase was provided during the first year of the agreement during which the 132 wage grid would remain in effect. The proposal included a wage reopener for the first and second anniversaries of the effective date of the Agreement. The previous employer proposal for merit increases had been removed.

Williams asked whether Brink's would agree to a statement of progressive discipline. Pagano replied that in the armored car business the concept of progressive discipline was not appropriately applied to dishonesty; stealing $1 was as bad as stealing $10,000. Williams said progressive discipline could be applied to absenteeism. He suggested a statement to the effect that nothing in the agreement would prohibit management from using progressive discipline. The parties agreed on a statement that the Company in its discretion could take prior discipline and performance into account in imposing discipline. Brink's did not want to agree to any provision for progressive discipline except in cases of absenteeism and similar violations.

The parties also discussed and reached agreement on many sections of the contract dealing with drug and alcohol use and testing. The parties reached agreement on Article V Uniforms, Equipment and Appearance. At first Pagano rejected the Union's demand that the Company pay half the cost of protective vests for those employees who wished to wear the vests.[22] On July 10, however, the parties signed off on a provision requiring such a payment which was consistent with the current Brink's policy.

The Union then moved to the subject of wages. Merritt complained that Brink's would not grant any increases so as to punish the employees for selecting the Union. Merritt said the Company would spend $1 million rather than allow LEEBA to spread. Pagano then offered a wage re-opener in the 2nd and 3rd years of the contract. Williams asked why the Union should agree to that and Pagano replied that Newark was a "shitty branch." Pagano said this was a proposal for a definitive wage increase.

Williams suggested that the parties put the wage issue aside and asked to move to Article VII Holidays. Merritt said the listed holidays were fine and he agreed to the holiday pay language.[23] The parties discussed leaves of absence and sick leave. Pagano suggested that after 3 days off sick an employee must submit a doctor's note; this was a change from the employer's prior more restrictive proposal. Pagano also agreed, contrary to his initial position, that an employee need not work a full year before accumulating the right to sick leave. The parties discussed the accumulation of sick leave days. Pagano rejected the Union demand for an additional "annual day off."

On July 10 Pagano and Woodley were again representing the company and Merritt and Williams were again there on behalf of the Union. The parties returned to a discussion of sick leave. The Union disagreed with the Company's proposal. Pagano wrote a new proposal and the parties then agreed upon a policy for sick leave accrual and payment of unused sick leave.[24] The parties discussed vacation pay and their different views of when an employee should be deemed full-time and entitled to vacation pay.

Merritt again asked for financial information relating to Brink's operations and when Pagano refused on the ground that the company had not pleaded inability to pay, Merritt angrily characterized his position as "bullshit" and said the company was treating him like an idiot. At Williams' suggestion, the parties took a break.

After the break Pagano asked for a counter proposal relating to part-time employees and Merritt said the Union's demand

[22] Brink's does not mandate the wearing of protective vests. Some employees believe that they decrease safety because a shooter would aim for the head instead of the chest if an employee were wearing a vest.

[23] The agreed upon Article VII Holidays was less favorable than the terms currently in effect.

[24] The Union agreed in Article VIII Sick Days that employees would accumulate 3 sick days per year. Under the current policy in effect, employees had 5 days per year.

had not changed; the Union would define part-time employees as those who regularly work less than 32 hours per week. The Company's position was that employees working fewer than 40 hours per week should be considered part-timers.

Merritt then asked whether Brink's had contracts with all of its customers. When Pagano replied that he did not know Merritt said the parties were at impasse. Merritt asked for all the customer contracts and Pagano told him to make a formal request in writing demonstrating the relevance of the request.

The parties agreed to Article X Medical, Vision and Dental Benefits. The Union agreed to various sections of this Article, including a section requiring the employees to pay any increases in the premiums for the health plans from the effective date of the agreement forward. Brink's employees currently pay only a portion of the premiums for health coverage, and in past years increases in premiums had been borne proportionately by both the Company and the employees. There was no discussion of this section. The Union only questioned another provision requiring employees to work 120 days before they became eligible for medical benefits. Brink's currently required only 90 days on the job. It is reasonable to wonder whether the Union negotiators understood the import of the language they initialed. As the General Counsel points out, the premiums for health coverage have risen significantly in recent years. However, none of the testimony or documentary evidence shows that the Union expressed any concern about the insurance premiums.

Williams said the parties should go back to discussing vacations and Pagano said he was not moving on that issue as he had done for sick pay. The Union asked for an additional day for bereavement leave and asked to add grandparents to the paragraph. Pagano agreed to this demand and the parties signed off on Article XI.[25] The Union asked that employees called to jury duty be paid by the company and keep the fee given to them by the State. Pagano said the Company's system was to pay only the difference between the jury duty fee and the employee's hourly wage.[26]

The parties discussed the no-strike no-lockout provisions of Article XIV and agreed to the contract language with some changes demanded by the Union. The parties signed Article XV Non-Discrimination. The parties discussed Article XVI Length of Service/Seniority and signed off on the language as drafted during the discussion.

At the end of the meeting the parties agreed that the subjects for discussion at the next session would be management rights, wages, Union visitation and leaves of absence.

The Company stated that it was unavailable to meet in August. The record does not disclose why there was no collective-bargaining session until October. Although Williams testified, "They were not going to be available to meet I believe until the fall" I find that the Company stated it was not available in August which comports with Pagano's custodial arrangements to spend August with his children.

[25] The provision on bereavement in Article XI agreed to by the Union was less favorable than the current policy.

[26] This was incorrect.

7. October 10, 2007 bargaining session and subsequent communications

a. Negotiations

The parties met on October 10, 2007 at the Long Island location selected by the Union. Meyer and Pagano represented Brink's and the Union was represented by Williams, Meletiche and Merritt.

Meyer testified that Merritt was over an hour late and that the parties held discussions before his arrival. The Union and the Company discussed drug testing. Then, Meyer asked whether the Union still insisted on retroactivity. According to Meyer, Williams replied that the Union was flexible but that there had to be some retroactivity of wages, union shop and dues checkoff. Williams did not specify how far the Union would back off from its requested effective date of April 20, 2006. According to Williams the Union withdrew its demand that the Union security provision be retroactive to April 2006. Pagano proposed that the parties agree to a three-year contract with step increases per the grid for the first year and a wage reopener for the second and third years. Williams asked to hold that discussion until Merritt was present.

The parties discussed visitation. Williams wanted to carry his gun when meeting unit members on site but Brink's does not admit any armed person to its facilities. The Company offered to provide a parking space in the facility if the Union gave notice of its visit so that the gun could safely be left in a car. The parties corrected a typographical error in the draft agreement and the Company agreed to certain changes in the draft requested by the Union. Finally, the parties agreed to Article XX Union Visitation and Williams said Merritt would sign off when he got to the meeting. As initialed by the parties on October 10, the provision permitted two Union officers to visit the premises, rather than the one officer originally proposed by Brink's. The visits were permitted during working hours for grievance processing.

The parties agreed to Article XXI General Provisions and Williams said Merritt would sign off when he arrived.

After Merritt joined the meeting he repeated his request for financial information and Pagano stated that Brink's had never pleaded an inability to pay.[27] Merritt then pressed his request for copies of contracts between Brink's and his customers. In the discussion that ensued, Merritt repeatedly called Pagano a "fucking liar" and pointed his finger at Pagano. When Pagano told him to stop it Merritt repeated his curses, called Pagano a "fucking coward" and said, "Step outside and settle this." Pagano said that he had no obligation to bargain further that day and he stated his intention to leave. After some talk with Williams, Pagano left the room.

Meyer then informed Merritt that his behavior was disrespectful. He said that the Union could get a contract but that was not the way to get one. Merritt replied that this was "bullshit" and he left the room.

Soon after, in the parking lot, Meyer and Pagano spoke with Williams for about an hour. They discussed the Union's re-

[27] Pagano gave Merritt a legal memorandum with citations on the issue of requests for financial information.

quest for information. Williams repeated the Union's demand for a $1.00/hour wage increase. Williams testified that he told the management representatives that the Union wanted an instant pay increase of $1.00/hour retroactive to April 2006 and that he wanted to add a merit increase to that amount. Meyer testified that Pagano replied that the Company did not want to give a retroactive increase and wanted to keep the grid but that it was flexible on the wage increase. Pagano asked how the Union's proposal would impact the grid and Williams could not answer that question. Meyer asked Williams for dates to negotiate further.

b. Communications October through November 2007

Thereafter, Meyer and Merritt exchanged e-mails giving their versions of the meeting. Meyer asked Merritt to suggest further dates for collective bargaining. Merritt suggested binding arbitration to resolve the contract.

On October 19 Pagano wrote to Williams and Merritt about yearly changes in the company-wide employee insurance program. Pagano stated that unless he heard to the contrary, Brink's would implement the changes on January 1, 2008. Pagano offered to negotiate concerning the changes or any alternative plan that the Union might propose.

Merritt wrote to Meyer on October 20, 2007. Merritt's letter covered five areas:

Merritt stated that the Union would agree to a three year contract if it commenced on April 20, 2006 and expired on April 19, 2009. If Brink's wanted a later commencement date, the Union would only agree if the contract expired on April 19, 2009. Merritt did not explain this demand. Merritt stated that Brink's had refused to discuss a Union proposal on shop stewards, and he asserted that the parties were deadlocked on this issue. Merritt withdrew the Union's proposal for a contractual provision covering managers and salaried personnel. Merritt confirmed that Brink's had agreed to implement a DOT standard relating to drug testing. Merritt stated that, "until Brink's decides to present a reasonable period of time for filing a grievance, we are deadlocked on this issue."

Pagano replied to Merritt on October 29.[28] Pagano commented that Merritt had regressed from Williams' statement on October 10 that the Union would be flexible on retroactivity. Pagano analyzed the Union's wage demand in light of this position and pointed out that the Union was asking for "a $1.00 per hour across-the-board wage increase retroactive to April 1, 2007, another $1.00 per hour increase retroactive to April 20, 2007, and another $1.00 per hour increase effective April 20, 2008." Pagano repeated the Company's offer of a three-year contract but stated that, "Brink's will consider a shorter duration of a CBA as well as additional wage increases than we have already proposed, but rejects any retroactivity of the CBA . . . ." I note that in the voluminous correspondence between the parties, no Union representative ever disputed the Company's reading of the March 6, 2007 Union proposal. The Union never denied Brink's repeated assertions that it was seeking a $1.00/hour raise on April 1, 2007 and another $1.00/hour raise on April 20, 2007.

[28] I shall only discuss the most important portions of Pagano's letter.

Pagano recapitulated the parties' discussions concerning shop stewards and visitation and clarified that Brink's only objected to the Union's language that "the stewards and their assistants" could be relieved from duty whenever they chose to conduct Union business and that they would be paid for their time. Pagano reiterated the Company's proposal about shop stewards and Union representation during investigatory interviews. With respect to the grievance and arbitration proposals, Pagano pointed out that Merritt remained under a misapprehension about the company's position. Pagano reminded Merritt that in December 2006 he had offered to allow seven days to file a grievance and had withdrawn Brink's original proposal that a grievance must be filed within 72 hours.

On November 19, 2007 Williams wrote to Pagano, suggesting that the two men meet after Thanksgiving for an "information session" in order to set the stage for further negotiations.

8. December 10, 2007 bargaining session and subsequent communications

a. Negotiations

The parties met for collective bargaining on December 10, 2007. Meyer and Pagano represented Brink's. The Union was represented by Williams and Meletiche.

The Company again assured the Union that the Newark branch was not closing.

The parties agreed on many changes to the language of the grievance and arbitration provisions in Article XIII. Pagano testified that the Company changed its proposals on the time for the various steps of the grievance procedure. The Company also agreed to pay for attendance at grievance and disciplinary meetings while on duty. However, Williams said that he would not initial any items as tentatively agreed because all provisions had to be OK'd by Merritt. The section dealing with the powers of the arbitrator was left open. The Brink's proposal did not give the arbitrator discretion to reduce a penalty or discipline and there was no provision for back pay if a grievance was sustained. The Union wanted the arbitrator to have more discretion.

The parties discussed their respective management rights proposals. Meyer said the Union's clause was ridiculous and Williams pointed out that the Company's proposal had too many words. Meyer agreed to send a shorter revised management rights proposal to the Union. Pagano proposed a modification giving some seniority to part-time employees.

The parties discussed portions of Article XXI General Provisions that had not previously been agreed to. The Union objected to section 3 regarding waiver and the parties agreed to hold that issue. The parties agreed to section 2 and to sections 4 and 5 with revisions requested by the Union. Again, Williams refused to sign off because he had to review the issues with Merritt. When Meyer objected that Merritt would come back with issues and the parties would be at square one again, Williams promised that this would not be the case. Williams said he would review the agreed upon language with Merritt and e-mail the Company that the language was either agreed to or that the Union still had "issues."

The parties discussed Article XXII Confidentiality. Pagano agreed to consider the Union's concern that the language of the

Brink's proposal might prevent the Union from giving some Company documents to a government agency.

The parties discussed those portions of Article IV Rules and Regulations relating to drug and alcohol testing that had not been previously agreed to. The parties agreed to Article XXIII Separability. Williams said that the Union would submit a suggested grievance form. He asked the Company to propose language on the use of cell phones. The parties again discussed the need to provide a parking space for Union officials who were carrying firearms. The Union said it would train the shop stewards and the parties discussed issues related to training and meetings.

The parties tried to identify those contract issues that remained open. Williams and Pagano agreed that the Union would send an e-mail identifying issues that remained open in the Union proposal. Williams ended by promising that the Union would be in touch to schedule another meeting.

Williams testified that he sent an e-mail to Merritt about the agreements he had reached with Brink's, but he and Merritt never had a thorough discussion about the issues. Williams testified that when he gave Merritt the details of his December 10, 2007 meeting with Brink's he did not list any major outstanding issues other than wages. Williams testified that Merritt did not approve any of the tentative agreements concluded at the December 10 session. Williams acknowledged that he had promised the Company representatives a letter giving Merritt's conclusions and listing all the issues that remained outstanding in the view of the Union. Williams never sent this letter to Pagano and Meyer nor did he move to schedule another meeting as he had promised to do. Williams did not offer any testimony to explain his failure to seek further negotiations after December 10, 2007.

Merritt testified that he was not aware that the Company had met with Williams and Meletiche on December 10, 2007; he stated that he heard about it long afterwards from Union president Wyndor. Merritt said he did not ask anyone what had happened at the meeting. Williams reminded Merritt that he sent a list of provisions that he had agreed to with Pagano but Merritt testified that he did not recall receiving the information. In fact, Merritt testified, he first heard about the meeting of December 10, 2007 just before testifying in the instant hearing on July 2, 2008.[29]

On January 21, 2008 Kenneth Wyndor, the LEEBA president, addressed a letter to the Brink's bargaining unit members. Wyndor told the members that LEEBA "has attempted to negotiate an agreement that would give you periodic pay raises, job security and a written discipline policy. . . . While we have achieved a grievance and discipline policy in negotiations, Brink's has refused to budge on any economic packages that would provide you with pay raises." Wyndor went on to say that the members could only obtain a pay raise by going on strike. He said that the company would not give anything other "than the present merit system."[30] Wyndor concluded by telling the employees that, "If you agree to a contract without a pay raise, you will avoid a strike and allow LEEBA to begin to accrue funds in the form of dues that will allow the building of a strike fund." The letter enclosed a ballot with which the employees could either vote "to accept a contract with no economic package" or vote "to strike to achieve a substantial pay raise."

Williams testified that at about this time the Union may have realized that it could not obtain interest arbitration for the contract with Brink's.

b. Communications June 2008

The next communication from the Union to Brink's was dated June 4, 2008, shortly before the first day of the instant hearing. Merritt wrote to Pagano that "in consideration of the pending proceedings before the NLRB" he was seeking to determine whether Brink's would move to a "moderate wage increase." Merritt said, that the Union proposed "a $.75/hour increase until April 1, 2007 and an additional $1.00/hour raise to April, 2008. Time for filing a grievance should be twenty (20) days."[31]

On June 9 Meyer replied on behalf of Brink's. Meyer said that the Union's demand amounted to an increase of $.75/hour retroactive to April 20, 2006 and $1.00 retroactive to April 20, 2007. Meyer pointed out that the Union had not abandoned its demand that the entire contract be retroactive to April 20, 2006. Meyer stated that Brink's was willing to review its wage proposal if the Union changed its demands. Meyer pointed out that the Union had never honored Williams' promise to give a final answer on the agreements reached at the December 10, 2007 negotiating session. Meyer also faulted the Union for failing to provide dates for further meetings as promised by Williams on December 10, 2007. Meyer attached the revised management rights proposal that he had drafted after the December 10 meeting in anticipation of further bargaining. Meyer stated that Brink's accepted the Union's proposal for a 20 calendar day period to file a grievance. Meyer closed by stating that the parties were at impasse if the Union continued to insist on wage increases retroactive to April 20, 2006 and for a contract retroactive to that date. However, if the Union stated that it would modify its retroactive demands in future bargaining, Meyer said that Brink's would meet and bargain with the Union.

Merritt responded to Meyer on June 9, stating among other things, that the Union was not asking for retroactive Union dues. Merritt did not give Brink's any dates for further negotiations. Merritt testified that he did not read the revised management rights proposal sent to him by Meyer on June 9.

On June 20, 2008 Williams wrote to the bargaining unit employees. He told them that, "The only major outstanding issue is an economic package or wage increase." He informed the employees that, "LEEBA believes the Newark employees are deserving of a pay increase dating back to April 2006. We propose a $.75/hour increase until April 01, 2007 and an additional $1.00/hour raise to April, 2008." In his testimony herein,

[29] I note that on June 9, 2008 Meyer wrote to Merritt about the meeting in a letter described below.

[30] Wyndor was apparently unaware that Brink's had changed its offer from merit increases to a wage reopener.

[31] I have omitted material that rehashed controversies arising during the negotiations as well as the response from Brink's.

Williams affirmed that the only major outstanding issue as of June 20, 2008 was a wage increase.

9. Additional testimony of the negotiators

On cross-examination, Williams was asked about the 132 wage grid that was in effect in January 2006 and that was still in effect at the time of the hearing. Williams testified that the Union had asked for $1.00/hour increases effective April 20, 2006, April 20, 2007 and April 20, 2008. However, Williams said, the last Union demand was for $.75 retroactive to April 20, 2006 and $1.00 retroactive to April 1, 2007. Williams said that the increase would apply to all employees regardless of their step placement on the grid. However, Williams could not say whether the increases were to be added to the step increases provided by the grid. He could not say whether the rates set forth for each step in the grid were to be raised. He could not say if an employee who received a $1.00 increase one year would also get the step increase as augmented by the $1.00 increase that had been provided in the prior year. Williams did not understand how the Union's demand would actually work in raising the employees' wages. He ended up by saying that he thought the Union had asked to eliminate the grid. Williams could not explain the Union demand's effect on seniority and whether the Union's proposal was that all employees in a title were to be paid the same hourly rate regardless of seniority.

On cross-examination Merritt was similarly not able to explain the Union's wage demand. At first he maintained that he did not have a copy of the 132 wage grid when the Union made its wage proposals in September 2006, although the record clearly shows that this is incorrect.[32] Then Merritt said he did not reference the wage grid or take it into account in making the Union wage demands. Merritt also said that the Union did not propose to eliminate the grid; he just wanted to put in the wage increases. Finally Merritt testified that the Union proposal encompassed the grid. Merritt testified that the Union's last proposal of June 4, 2008 demanded a $.75/hour increase as of April 20, 2006 for each step on the grid. The $.75 was to be added to the existing scale. If in the month after receiving a $.75/hour wage increase the employee went to the next step on the grid the new rate would have been raised by $.75. However, the Union also wanted $1.00/ retroactive to April 20, 2007, so the rates would have been raised by $1.75/hour on execution of the contract. Merritt stated that the Union also demanded a $1.00/hour increase retroactive to April 20, 2008. I note that this explanation was never given to Pagano and Meyer during the negotiations.

Merritt maintained that the employees had not been getting any wage increases during the bargaining because he had not been told of any increases. He apparently did not realize that the grid system was providing the employees with wage increases as they attained different steps of seniority.

Merritt testified that the language of the Union proposal made the entire agreement retroactive to April 20, 2006. He testified that this was not a clerical error. However, he said that he accepted Pagano's statement that retroactive dues could not be collected under the NLRA and if that request appeared in any documents it was an error.

Merritt said when the bargaining began he was asking for a $1.00/hour increase over existing wages and he was willing to make concessions to get the $1.00/hour.

On cross-examination Meyer testified that by October 10, 2007 the Union had agreed to less favorable terms than the employees currently enjoyed with respect to medical benefits, sick days, vacation, bereavement, jury duty and holidays. Meyer pointed out that Merritt had never finally agreed to the arbitration provisions and to the drug and alcohol provisions that he had negotiated with Williams and that had been changed in ways requested by the Union. Meyer acknowledged that the zipper clause proposed by the company, if agreed to in its original form, would waive certain of the Union's rights to bargain over working conditions and benefits. Meyer also pointed out that Brink's had agreed to many provisions that were important to the Union such as a succcessorship clause, concessions on probationary employees, Union security and checkoff, discipline and a plethora of language modifications requested by the Union. Meyer emphasized that the draft contract, as it read during the hearing, was not a final contract.

D. Discussion and Conclusions

The General Counsel asserts that Brink's did not offer a comprehensive contract to which the Union might agree. The General Counsel states that Brink's wage offer was unreasonable and designed to avoid an agreement. The General Counsel argues that Brink's made harsh proposals that sought regressive give-backs and bargaining waivers on subjects including discipline, work rules, protective vests, assignment of work to non-unit personnel, vacation, sick leave, holidays, bereavement leave, jury duty, medical benefits, layoffs and subcontracting. The General Counsel states that Respondent failed adequately to explain its demands for bargaining waivers and regressive give-backs and that this amounts to an indication of bad faith.

The General Counsel states that Brink's made a regressive wage proposal without providing proof of its rationale. The General Counsel asserts that the Company's initial proposal to change from a system of mandatory seniority-based increases to a system of merit wage increases was unjustified.

Further, according to the General Counsel, the only concessions made by Brink's were Union security and dues checkoff and extremely limited provisions for Union visitation and grievance/arbitration procedures.

The General Counsel points out that the Union displayed an extraordinary willingness to accept regressive and discretionary proposals in order to secure a wage increase and job protection.

The General Counsel sums up by stating that "Respondent sought to insure that the parties would not reach agreement by making wildly unacceptable proposals that it could not justify or substantiate."

In *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), the Board summarized its views on surface bargaining. The Board began by stating the obligation of the parties under Section 8(d) of the Act to meet and confer in good faith, "but such obligation does not compel either party to agree to a proposal or require the making of a concession." Although the parties have

[32] Merritt resisted admitting that he was given information by Brinks in June 2006.

a duty to negotiate with a sincere purpose to find a basis of agreement the Board cannot force a party to make a concession on any specific issue. An employer's overall conduct must be scrutinized to determine whether it has bargained in good faith. The total conduct will show whether an employer is lawfully engaging in hard bargaining or unlawfully endeavoring to frustrate the possibility of arriving at any agreement. A party may stand firm on a position based on a reasonable belief that it is fair and proper or that "he has sufficient bargaining strength to force the other party to agree." Thus, adamant insistence on a bargaining position is not of itself a refusal to bargain in good faith. Conduct indicative of a lack of good faith includes delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions and arbitrary scheduling of meetings.

There is no evidence in the record that Brink's made any unilateral changes in mandatory subjects of bargaining, that it engaged in efforts to bypass the Union, that it failed to designate an agent with authority to bargain, that it withdrew agreed-upon provisions or that it scheduled meetings arbitrarily. Further, the evidence recited above shows that Brink's always responded promptly to the Union's requests for collective-bargaining meetings and that it responded to the Union's requests for information either by furnishing the documents or explaining why the information would not be produced. Indeed, the evidence shows that Brink's frequently requested new dates for negotiations with the Union and deplored the Union's suspension of negotiations while an unfair labor practice charge was being settled. Further, from the first day of negotiations the Company's negotiators explained to the Union that the entire contract would have to be negotiated, and the company repeatedly sought to dispel the Union negotiators' erroneous belief that by law the contract had to be retroactive to the date of certification and that the negotiations were subject to mandatory binding interest arbitration by the NLRB.

The General Counsel has characterized many of Brink's bargaining proposals as regressive. A reading of the cited cases shows that the Board defines "regressive" bargaining as a change from a prior more favorable bargaining proposal. *Mid-Continent Concrete*, 336 NLRB 258, 260 (2001); *Challenge-Cook Bros.*, 288 NLRB 387, 388 (1988); *Rescar, Inc.*, 274 NLRB 1, 2 (1985). It is clear that, as in *Challenge-Cook* and *Rescar,* even a regressive proposal advanced during the course of negotiations is not unlawful if the circumstances explain it. The record herein shows that Brink's did not alter any of its initial proposals so as to make them less favorable to the employees.

Other cases consider the validity of an initial contract proposal that is less favorable than existing conditions. Such a proposal is not per se unlawful. In *I. Bahcall Steel Industries*, 287 NLRB 1257, 1261 (1988), the Board affirmed the following discussion:

> [I]t is not unusual at the outset of negotiations for the parties, both union and management, to make demands that they realize, in all likelihood, will not be included in the final agreement. . . . However, the Board does not normally inject itself into the negotiations to proscribe such proposals. More often, the give and take of negotiations governs the final results. What really takes place, apart from whatever cunning and guile may achieve, is an economic test of strength. The relative economic strength of the parties and the recognition of those realities, are the factors which produced the middle ground where agreement is reached.

In the instant case, the Union laid out its priorities at the first bargaining session. The Union asked for the immediate implementation of a dues checkoff provision retroactive to the date of certification, a definition of acts leading to termination, a grievance and arbitration procedure and visitation rights for the Union. The record shows that Brink's responded to this request by including in its first and subsequent proposals a Union security provision with dues checkoff, Union visitation, and a grievance procedure with arbitration. Responding to the Union's first written demand, the Company's proposal included merit pay increases. As the General Counsel has pointed out, the grievance procedure and the Union visitation proposal were limited and the merit pay proposal was not advantageous, but that in itself does not make these initial proposals unlawful. Further, the Company discussed them with the Union and made changes to all these proposals. The Brink's negotiators explained the concern with security and discipline and how this concern impacted the company's willingness to compromise on issues of discipline, visitation and the grievance and arbitration provision. The Company explained at length how its security concerns impacted its proposal to limit the powers of the arbitrator. Eventually, the agreed-upon sections of the contract included a definition of acts leading to termination, a grievance and arbitration procedure, a visitation procedure and Union security. The General Counsel urges that some of the agreed-upon provisions were not advantageous to the employees; nevertheless, they represented agreement on items that the Union had asserted were of prime importance.

Similarly, the General Counsel points out that the Union agreed to less advantageous terms than were currently in place with respect to bereavement leave, sick leave, jury duty, vacation, holidays and medical benefits. Nevertheless, the record shows that all of these items were bargained and agreed to by the parties and that Brink's responded to the Union's request for improvement over the original proposals with respect to bereavement and sick leave. The record does not disclose much discussion of the health insurance benefits provision. Apart from questioning the waiting time for eligibility for health benefits the Union made no effort to improve on the Company's offer in this area and there is no particular testimony to show why the Union agreed to the provision requiring employees to pay all future premium increases. However, Merritt testified that the Union wanted a significant increase over existing wages and he was willing to make concessions to get the increase. This, perhaps, is one reason for the Union's concessions which are otherwise not discussed in the record.

The General Counsel relies on *A-1 King Size Sandwiches, Inc*., 265 NLRB 850 (1982), a case where the Board found that the employer had engaged in surface bargaining by insisting on

retaining "total control over virtually every significant aspect of the employment relationship." The decision in that case relied principally on the employer's insistence that there would be no bargaining on wage rates; the employer's decision to grant a merit increase would be final because the Union could merely make suggestions while observing a merit review for each employee. Further, the company retained total control over discipline and discharge, layoff and recall and working conditions. Manifestly, the bargaining in the instant case resulted in agreements on many terms and conditions including subjects relating to discipline, discharge, seniority and layoff. These agreements may not have been as favorable to the Union as might have been imagined; however, the Union signed off on them. The unequal economic power of the Union and Brink's was a significant, and wholly lawful, factor in the negotiations. It is not unlawful for an employer to engage in hard bargaining in order to gain an advantage from the realities of the situation.

Another factor in the outcome of the instant negotiations was the behavior of the Union negotiating team. By their own admission, the Union negotiators were inexperienced in bargaining under the NLRA. The record shows that Merritt and Williams believed that the contract they were negotiating would be retroactive to the date of certification by operation of law. Further, the Union representatives believed that any unresolved issues would be submitted to mandatory interest arbitration. Indeed, Merritt repeatedly taunted the Brink's representatives with the prospect that an arbitrator would give the Union certain contract provisions that the Company would not agree to in negotiations. Merritt frequently declared impasse on various issues in the belief that these issues would be submitted to interest arbitration under the aegis of the NLRB.

These unfounded and erroneous beliefs on the part of the Union negotiators contributed to the Union's dilatory behavior during negotiations. The Union suspended negotiations after the first bargaining session while an unfair labor practice charge was resolved. The record is replete with instances where the Company negotiators requested bargaining dates and chided the Union for failing to come to the table. Thus, the Union would not supply dates for bargaining for the periods from May 23 to December 27, 2006 while the ULP charge was being settled, and it did not initiate any contact with Brink's from December 10, 2007 to June 4, 2008 even though on December 10 Williams had promised to contact the employer with dates for further negotiations. I contrast this with the delays occasioned by the Company's negotiators who were not available in August 2006 and August 2007. The record shows that Merritt was reluctant to attend meetings with the Company; instead, he often wanted to negotiate on the telephone or in writing. Brink's was not required to conduct negotiations by phone or by mail. *Alle Arecibo Corp.*, 264 NLRB 1267, 1275 (1982). The Union's conduct was a result of the Merritt's and Williams' belief that it did not matter how long the negotiations dragged on because ultimately the Union was entitled to a retroactive contract to be written by an arbitrator.

Nor can it be said that the Company's negotiators used their superior knowledge to beguile the Union. From the first bargaining session on May 23, 2006 Pagano informed the Union that all the provisions of the contract would have to be negotiated, and the Company consistently told Merritt and Williams that there was no mandatory retroactivity for any of the contract terms. The Company explained that interest arbitration was not available to resolve the negotiations. Neither Williams nor Merritt offered any reason at the instant hearing why they did not believe the information given to them by Pagano and Meyer or why they did not do some research to inform themselves concerning the provisions of the law under which they were negotiating.[33] Because he erroneously believed that an arbitrator would necessarily impose a retroactive contract Merritt was quick to declare "impasse" whenever the Company did not accept a Union proposal and the Union negotiators were content to delay the negotiations.

Another difficulty in the negotiations arose from the Union's failure to revise its written demands to comport with the agreements it had reached. Thus, the Company negotiators could not be certain whether the Union was abandoning agreement on items that had previously been negotiated.

Despite all of the delays and difficulties in the negotiating process many of the terms of a collective-bargaining agreement were in place by December 10, 2007. At the last negotiation session, the parties agreed to a number of provisions which Williams promised to discuss with Merritt and then confirm with the Company. Williams informed Merritt of these agreements after December 10 but he received no response from Merritt. Williams apparently did not press Merritt for an answer and he did not communicate further with the Company. In typical fashion, Merritt denied receiving any information about the agreements reached by Williams and the company on December 10, 2007. Nevertheless, Williams testified that by 2008 the only issue remaining was wages. The Union sent a letter to the bargaining unit members on January 21, 2008 informing them that all that remained to be agreed upon was a wage increase. Thus, the Union itself believed that it had achieved substantial agreement on a collective-bargaining agreement; the exception was wages. Whatever other gaps may still have been present, it is clear that the Union did not consider them significant obstacles to the attainment of a complete collective-bargaining agreement if wages could be resolved.

The record shows that the Company tried to discuss wages with the Union on various occasions. At the second bargaining session on February 6, 2007 Pagano asked the Union to explain its wage demand. As set forth in detail above, the Union's demand called for yearly $1.00/hour pay increases beginning on the effective date of the agreement and the Company wanted to know how this demand would impact the existing grid seniority pay system. Merritt did not try to explain the demand; instead, he declared impasse and soon left the meeting. At the next meeting on February 13 Pagano pointed out that the Union's draft agreement had left a blank in the provision for a starting wage rate and he asked the Union what amount it proposed. The Union did not reply to this question. The Company then agreed to pay overtime after 40 hours of work. At that point the Union repeated its demand for a flat increase of

[33] Williams testified that the Union did not know that the contract could not be reached through mandatory interest arbitration until sometime around January 2008.

$1.00/hour each year retroactive to April 20, 2006. When Pagano said the Company would only agree to a raise going forward, Williams replied that wages and the entire contract were, as a matter of law, retroactive to the date of certification. Meyer explained that this was not the case under the NLRA. Pagano said the Company was offering merit increases, and Merritt again declared impasse. On February 27 Pagano wrote to Merritt stating, inter alia, that the Company rejected the demand for a $1.00/hour wage increase retroactive to April 20, 2006 but he offered to negotiate across the board increases either standing alone or in connection with the existing wage grid. He said he would negotiate about the retroactivity of wage increases. Merritt responded on March 6; the Union's draft agreement provided a $1.00/hour increase on April 1, 2007 and another $1.00 increase on April 20, 2007. Merritt did not explain how this would impact the seniority step increases in the grid.

On July 9, 2007 the Company gave the Union a new wage proposal which abandoned merit increases and called for a wage reopener on the first and second anniversaries of the agreement. On October 10, 2007 the Company asked whether the Union still insisted on retroactivity and Williams said the Union was flexible but it needed some retroactivity of wages. However, later the same day Williams said the Union wanted an immediate $1.00/hour increase retroactive to April 2006. Meyer said the Company did not want retroactivity but that it wanted to keep the grid and was flexible on the wage increase. The Company asked how the Union's proposal would impact the grid; Williams could not explain the Union's proposal. On October 29 Pagano again raised the subject of wages and pointed out that the Union's demand apparently still was for a $1.00/hour increase on April 1 and 20, 2007 and on April 20, 2008. Pagano said the Company would consider different wage increases than those it had already proposed.

I conclude that the Union did not respond in any meaningful way to the various overtures by Brink's designed to get the parties to a wage discussion. Despite changes in the Company's wage proposals and inquiries by the Company as to the meaning and ultimate direction of the Union's wage requests, the Union never changed its wage demands.[34] Throughout the negotiations the Union insisted on three retroactive $1.00/hour wage increases even though Brink's emphasized that it would not grant such a large increase on a retroactive basis. The Union never told Brink's what it was demanding as a starting rate, even though several draft agreements left that number blank and the Company asked what the Union proposed on that issue. Further, the Union never explained its wage demand in terms of the grid. In fact, Williams could not explain in the instant hearing whether the Union was asking to eliminate the grid and, if so, what the wage schedule would look like and whether there would be differences in pay based on seniority. Merritt testified, inconsistently, that he did not take the grid into account and that the Union did not want to eliminate the grid. Eventually at the instant hearing Merritt also tried to explain how the Union's demand meshed with the grid. But Merritt never gave this explanation to Brink's during the negotiations.

The Union did not change its wage demands or try to explain them because, until after the Union abandoned the negotiations following the December 10, 2007 meeting, the Union negotiators believed that the law required the submission of the contract to interest arbitration with retroactive effect. Merritt, who seemingly had the last word on whether to approve an agreement with the Union, taunted Brink's with the prospect of arbitration resulting in retroactive wage increases.

In these circumstances, it was well nigh impossible to reach agreement on a wage provision for the contract. The Union did not change its demand during the bargaining and the Union could not explain the effect of its demand on the existing wage patterns established by the grid. The Union negotiators expressed their conviction that an arbitrator would grant retroactive wage increases in line with the Union position in negotiations. As a result the Company's efforts to ascertain where the parties might come to a meeting of the minds were doomed to failure. If the company had made more generous wage offers as the bargaining progressed it might well have ended up bargaining against itself.

Finally, as described above, after the December 10, 2007 meeting the Union did not keep its promise to contact the Company with Merritt's decision concerning the many agreements reached by Williams. Williams had assured Meyer and Pagano that the Union would be in touch to schedule further negotiations, but the Union did not contact the Company. Although the Union told its members that all that remained was to negotiate a wage provision, the Union did not proceed to bargain on this subject pursuant to Williams' promise on December 10, 2007. The Union abandoned the negotiations until it sent the letter of June 4, 2008 shortly before the instant hearing was set to open.

The Union's initial position had been for a three-year contract ending on April 19, 2009 with retroactive $1.00/hour wage increases. The Union never abandoned its demand for a contract effective on the date of certification.[35] The Union's final communication to Brink's on June 4, 2008 still called for retroactive increases effective in April 2006 and April 2007; the first increase was reduced to $.75/hour, but no indication was given of the increase sought for 2008. By this time it was clear that the Company was not willing to give wage increases retroactive to 2006 and Meyer's response reiterated this point. Meyer told Merritt that Brink's would review its wage proposal if the Union changed its demand for a contract with wage increases retroactive to April 2006. The Company was adhering to its oft stated and consistently held position that it would not agree to a retroactive contract with wage increases going back to the date of certification. Brink's had consistently informed the Union of its position that initial collective-bargaining agreements were not usually retroactive to the date of certification. Brink's believed that its position was fair and proper. The Company had

[34] Shortly before the instant hearing commenced in June 2008 the first retroactive wage increase demand was changed from $1.00/hour to $.75/hour. This was done "in consideration of" the fact that the hearing was about to open. This proposal was not made during the bargaining between the parties.

[35] The Union did eventually abandon retroactive application of Union security and dues check-off.

explained to the Union the difference between public sector and private sector bargaining and from 2006 the Company had urged the Union to come to the bargaining table. Brink's was entitled to stand firm on its position against retroactive wage increases. In the same way, the Union was also standing firm on its position for retroactive wage increases and the Union was also engaging in hard bargaining on the wage issue. The Union had achieved agreements which it deemed important and it had made concessions in an effort to obtain other objectives, but the Union negotiators were not prepared to budge on the issue of wage retroactivity. Brink's had the right to test its bargaining strength against the strength of the Union. *Challenge-Cook Bros.* 288 NLRB 387, 389 (1988). The fact that wages were not agreed to is not, in itself, evidence of unlawful bargaining by the Company. *I. Bahcall Steel Industries,* supra at 1261. I do not find that the Company's position on the retroactivity of wages was an attempt to frustrate agreement with the Union.

Given the facts found above, I cannot conclude that Brink's engaged in surface bargaining.

CONCLUSION OF LAW

1. The General Counsel has not proved that Brink's refused to bargain in good faith with Law Enforcement Employees Benevolent Association in the following appropriate unit

> All full-time and regular part-time drivers, messengers, guards, vault guards, coin and currency guards, ATM techs, garage persons, night loaders and premise guards employed by Respondent at its 481-495 New Jersey Railroad Avenue, Newark, New Jersey facility, excluding all other employees and supervisors as defined in the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 4, 2009

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.